

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WADE KEENAN BRUCE
Claimant

VS.

ASSOCIATED WHOLESALE GROCERS
Self-Insured Respondent

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Docket No. **1,043,919**

ORDER

Respondent requests review of the March 25, 2009 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

The Administrative Law Judge (ALJ) found claimant's accidental injury arose out of and in the course of employment. Respondent requests review of whether the ALJ erred in finding that claimant's accidental injury arose out of and in the course of employment. Claimant argues the ALJ's Order should be affirmed.

It should be noted that the exhibits introduced at the March 24, 2009 preliminary hearing were not attached to the transcript of that hearing nor were they included in the administrative file. Consequently, the parties provided copies of those exhibits to the Board and they were considered as part of the evidentiary record.

The sole issue raised on appeal to the Board is whether claimant suffered accidental injury arising out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Wade K. Bruce has worked approximately seven years for respondent as a forklift operator. His job is to fill orders by pulling the product from the storage shelves, placing the product onto the wooden pallets, wrapping it up and then using the forklift to move the product to the door for distribution.

Before his alleged work-related accident on December 23, 2008, Bruce had been working 12-hour days for 5 or 6 days and he had noticed that his left ankle was stiff and a little swollen. Before he started work on the morning of the accident, Bruce contacted David Turner, respondent's safety supervisor, and told him that his foot was sore from the night before and he asked Turner to take a look and see if it was swollen. Turner asked Christopher Griffin, respondent's warehouse operations manager, to join the conversation. Bruce testified that he was asked if he was okay and whether he would be able to work that day. Bruce denied that he was asked whether his condition was work-related. Bruce testified that he was told it was up to him whether he worked that day or not. Because he did not feel he needed medical treatment and did not need to go home, Bruce elected to work but told Turner, that he "wouldn't be able to run a hundred percent."

Bruce described his accident on December 23, 2008, in the following manner:

I got off my pallet jack and reached up and walked -- I stepped up onto a pallet. There was another pallet that had the product in back of it, and I turned around and stepped off of the pallet. At the point that I stepped off of the pallet, my foot popped and I went -- I went into -- I went into extra bad pain right then.¹

Bruce testified that the pallet was about six or seven inches tall when he stepped off of it to get back onto the forklift. He had been working about four hours when the accident happened. Bruce testified that he had not had any problems with his left foot before the accident. He explained:

Q. Okay. Distinguish, if you would, between your ankle symptoms before you stepped off that pallet and after you stepped off the pallet.

A. It was -- actually, a supervisor had come by and said that we needed to -- I needed to pick it up. He told a couple people that we needed to pick it up, so I was trying to pick up my pace. In fact, the last order that I had finished, I was trying to beat the last order. So I was gradually picking up. I felt better. In fact, I felt better than I did at the beginning of the shift.

Q. And then after your pallet incident?

A. After the pallet incident, it just -- I couldn't hardly walk.²

Turner testified that Bruce came to see him on December 23, 2008, with complaints of ankle and foot pain and said he did not think he would be able to work that day. Turner said Bruce did not know what had happened to his ankle and foot. Turner then had Griffin join the conversation. Turner said claimant was then asked if the condition was work

¹ P.H. Trans. at 7.

² *Id.* at 12.

related and Bruce denied it was work related as he did not know what had caused the ankle and foot pain. Bruce was then told he should go see his doctor, go to work or claim an accident.

Griffin testified that Bruce was asked if his condition was work related and he said it was not. Griffin agreed Bruce was then given the three options and elected to go to work. Griffin agreed that he and Turner were comfortable with Bruce's choice that he was physically able to work at that time.

Lynn Hurt, respondent's security officer and emergency medical technician, testified that on December 23, 2008, Bruce came to see her and told her what had just happened. Hurt testified that she asked Bruce whether he had previously injured the ankle which he denied. Hurt stated she asked that question because Bruce had severe bruising on his ankle and foot and she thought the coloration of the bruises indicated he was in the latter stages of the healing process rather than indicative of a recent injury. Hurt testified that she thought Bruce had an old ankle injury and that his foot was hurting because he was favoring that old injury. But Hurt agreed that she had not seen Bruce limping before the accident.

Respondent referred Bruce to Shawnee Mission Medical Center for treatment. X-rays were taken and he was diagnosed with an avulsion of the distal medial malleolus. His left foot and ankle was wrapped in a splint. Restrictions were also imposed. Bruce provided respondent with his restrictions but they could not be accommodated.

Respondent then referred Bruce to Concentra for another opinion. Dr. Temesgen Wakwaya, examined Bruce and noted that he denied any traumatic injury. Consequently, Dr. Wakwaya opined that it was not possible to fracture bone without any impact on the bone. Restrictions were again imposed and Bruce was taken off work from December 24, 2008, through January 16, 2009, when he was released to return to work.

On February 17, 2009, Bruce was examined by Dr. Michael J. Poppa who opined that Bruce's left ankle avulsion fracture was the direct and proximate cause of his injury to his left lower extremity.

Bruce continued to work until March 4, 2009. On March 4, 2009, Bruce sought medical treatment with the Veteran's Administration (VA) hospital due to pain and not being able to walk. The VA doctor placed Bruce on light duty with no prolonged standing. Respondent was not able to accommodate this restriction, so Bruce was placed on FMLA.

Because Bruce had complained of ankle and foot pain before he started working, the respondent argues that he did not suffer the alleged injury to his foot later that workday. The respondent's security officer/EMT concluded the discoloration and swelling indicated that his injury was in the healing process rather than having recently occurred. And Dr. Wakwaya did not think it was possible to suffer a foot fracture without trauma.

Conversely, Dr. Poppa concluded Bruce suffered the work-related injury when he stepped off the pallet and heard a pop followed by the onset of pain that left him unable to walk.

There is no dispute that Bruce had swelling and stiffness in his ankle before he started work on December 23, 2008. But he was able to work and testified that as he worked his ankle was feeling better until he stepped off the pallet, heard the pop and felt the immediate onset of pain. And he worked for four hours before the accident occurred.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.³ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁴ Dr. Poppa stated that the accident and injury was the direct cause of his left lower extremity condition. This Board Member finds his testimony more persuasive in this instance and affirms the ALJ's finding Bruce suffered accidental injury arising out of and in the course of his employment.

Moreover, where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the Bruce and respondent's representatives testify in person. In awarding Bruce benefits, the ALJ apparently believed his testimony over the respondent's witnesses. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated March 25, 2009, is affirmed.

³ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁴ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2008 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of June 2009.

DAVID A. SHUFELT
BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent
Steven J. Howard, Administrative Law Judge